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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-5731

MICHAEL GENE BERRYHILL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

When the jury sent a question to the judge via the bailiff, asking the judge if the jury could sentence Petitioner to life imprisonment without possibility of parole, and the judge sent back the message that he could not answer the question, were Petitioner's constitutional rights violated because he was not present during the exchange of messages?

STATEMENT OF THE CASE

The facts in Petitioner Michael Berryhill's case are not in dispute. On October 7, 1974, Petitioner, an ex-convict, bought ammunition for his .22 caliber pistol. (T. 389).[1] Afterwards, as Jerry Ray Lane and Petitioner were riding in an automobile in Cartersville, Georgia, Petitioner looked at various homes and stated that these homes were good places to burglarize. (T. 390). At approximately 10:45 p.m., Lane and Petitioner parked the car, and Petitioner rang the doorbell of the George Hooks' home in Cartersville. (T. 355, 391). George Hooks answered the door; and when he refused to let Petitioner in, Petitioner fired a shot through a small window beside the door. (T. 356, 685). As Hooks fled up the stairs to his bedroom, Petitioner shot him twice. (T. 359).

When Hooks reached his bedroom, he shut the door, and Mrs. Hooks frantically tried to find out what had taken place. (T. 359). Petitioner fired a shot through the door and hit Mr. Hooks again. (T. 360). Mr. Hooks released his hold on the door, and Petitioner shoved his way into the bedroom. (T. 360). As Mr. Hooks stumbled forward, Petitioner shot him again, and Mr. Hooks collapsed into his daughter Amy's bedroom. (T. 360-61). At this time the terrified Amy,

[1] T. refers to the trial transcript.

who was seven, was on her knees in bed and could see her father lying on the floor. (T. 361). When Mr. Hooks tried to get up, Petitioner shot him in the head; and this wound was the fatal one. (T. 361, 431). Despite the fact Mr. Hooks had no weapon to defend himself, Petitioner shot Mr. Hooks five times in all. (T. 363, 429). Three of these shots were fired while Mr. Hooks had his back to Petitioner. (T. 431).

During this time Petitioner was demanding money, and Mrs. Hooks pleaded with him not to hurt her husband. (T. 361-63). Petitioner threatened to kill Amy, and then he placed his pistol in Mrs. Hooks' face and threatened to shoot her in the face. (T. 363). By this time the Hooks' eleven-year-old son Steven had gotten out of bed. (T. 363). Petitioner grabbed Steven by the hair, shoved him to the floor beside Steven's dying father, and then placed a gun to Steven's head. (T. 363). Steven saw blood over his father's legs and head, and he could hear gurgling noises coming from the throat of his dying father. (T. 380-81).

When Mrs. Hooks told Petitioner she had her purse downstairs, Petitioner tore the phone out of the wall and threw it at her feet. (T. 363). They went downstairs where Petitioner took the six dollars from Mr. Hooks' wallet. (T. 364-65). They returned to the upstairs bedroom, and Petitioner ordered Mrs. Hooks to lie beside her dying husband. (T. 365). When she refused, Petitioner suddenly ran down the stairs and out of the Hooks' home. (T. 365).

After being indicted by a Bartow County, Georgia, grand jury, Petitioner was tried January 6-10, 1975, in the Bartow County Superior Court. The jury found Appellant guilty of felony murder and armed robbery, and the jury fixed Petitioner's punishment at death for the murder and life imprisonment for the armed robbery.

Petitioner appealed to the Georgia Supreme Court, and his conviction and sentence were affirmed October 28, 1975. Rehearing was denied November 24, 1975.[2] See Berryhill v. State, 235 Ga. 549, 221 S.E. 2d 185 (1975).

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[2]Jerry Ray Lane testified for the State at Petitioner's trial. (T. 384-424). At Lane's trial, Petitioner was called as a witness for the State (Lane trial transcript 73), and Special Prosecutor Elsey was permitted to ask Petitioner questions relating only to a conversation two days prior to Lane's trial. (Lane trial transcript 78). At the time of this conversation, Elsey no longer represented Petitioner.

Petitioner does not contest the jury's finding him guilty of felony murder and armed robbery. The only issue presented to this Court is that allegedly reversible error took place during the sentencing phase of Petitioner's trial.

A. THE PETITION FOR THE WRIT OF CERTIORARI IS NOT OF SUCH AN EXTRAORDINARY NATURE THAT IT REQUIRES THIS COURT TO ISSUE SUCH A WRIT.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and controlling reasons therefor." Rule 19, Revised Rules of the Supreme Court of the United States (1970).

This Court generally grants certiorari from a state court decision under the following circumstances: (1) if the state court has decided a federal question of substance not previously determined by this Court or (2) if the state court has decided a case in a way not in accord with applicable decisions of this Court. See Rule 19, Revised Rules of the Supreme Court of the United States (1970).

In his brief, Petitioner states that Georgia law is identical to federal law in that the accused has to be present at every stage of the trial. (Petitioner's Brief, p. 4). The majority opinion in Petitioner's direct appeal stated that "all communications with the jury are to be discouraged except in open court with all persons present." Berryhill v. State, supra at 554.

The chief case relied on by Petitioner stated that an ex parte communication between the judge and jury may be harmless error. Rogers v. United States, 422 U.S. 35, 40 (1975). The Georgia Supreme Court considered Rogers in its opinion and held that the communication between Petitioner's judge and the jury was harmless. Berryhill v. State, supra at 554.

What Petitioner is asking this Court to do is to review the Georgia Supreme Court's finding of harmless error, where Georgia law is identical to federal law. The writ of certiorari clearly is not to be granted under such circumstances. See N.L.R.B. v. Pitts. Steamship Co., 340 U.S. 498, 502-3 (1951).

B. WHEN THE JURY SENT A QUESTION TO THE JUDGE VIA THE BAILIFF, ASKING THE JUDGE IF THE JURY COULD SENTENCE PETITIONER TO LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE, AND THE JUDGE SENT BACK THE MESSAGE THAT HE COULD NOT ANSWER THE QUESTION, PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED EVEN THOUGH HE WAS NOT PRESENT DURING THE EXCHANGE OF MESSAGES.

In Georgia the accused has the right to be present at all stages of his trial, Wilson v. State, 212 Ga. 73, 90 S.E. 2d 557 (1955), including the right to be present when the jury is charged. Hopson v. State, 116 Ga. 90, 42 S.E. 412 (1902). Although all communications with the jury are to be discouraged except in open court with all persons present, Georgia courts have recognized that communications with the jury outside the presence of the jury are not necessarily reversible error. See Thacker v. State, 236 Ga. 170, 173 S.E. 2d 186 (1970), death sentence vacated, 408 U.S. 936 (1972); Leverette v. State, 104 Ga. App. 743(1), 122 S.E. 2d 745 (1961).

In Thacker, the bailiff relayed a question from the jury to the judge which inquired, "If he's guilty of manslaughter, when does he get paroled?" Thacker v. State, supra at 179. The judge told the bailiff to inform the jury that the judge could tell them nothing about parole. The Georgia Supreme Court held that such a statement did not constitute a charge to the jury and that there was no error. Thacker v. State at 180. In Leverette, a juror asked the judge, "What about the minimum sentence served and parole?" and the judge replied, "The court can't answer that question; the law won't permit the Court to discuss that with the jury." Leverette v. State, supra at 743. The Georgia Court of Appeals held that the judge's response did not amount to an instruction to the jury but was a refusal to instruct the jury on a prohibited issue. "The presence of counsel could in no way have aided the defendant where the Court himself took the proper steps to safeguard her rights." Leverette v. State at 743.

After finding Petitioner guilty of armed robbery and felony murder at the end of the guilt or innocence phase of the trial, a trial on sentencing was held.[3] The jury had to make a decision as to whether to impose the death penalty or life imprisonment.

[3]Georgia has a bifurcated trial procedure. See Ga. Code Ann. § 27-2503.

While the jury was deliberating, a juror asked the bailiff to ask the judge if the jury could sentence Petitioner to a life sentence without possibility of parole and if Petitioner would serve his entire life in the penitentiary. (R. 58).[4] Georgia law provides that an inmate serving a life sentence "shall become eligible for consideration for parole upon completion of the service of seven years." Ga. Code Ann. § 77-525.

Naturally the trial judge did not tell the jury that if they imposed a life sentence, Petitioner would be eligible for parole in seven years. Petitioner was 23 years old when he sadistically murdered a man in front of the man's wife and children and then terrorized the rest of the family. In open court, Petitioner admitted that he had previously been convicted of 35 counts of burglary and four counts of auto theft. (T. 689-91). A jury would hardly have imposed a life sentence had they known that Petitioner would have become eligible for parole when he was only 30 years old.

The only way for the trial judge to respond, without lying and without harming Petitioner, was not to give an answer to the question. The judge told the bailiff to

[4]R. refers to the record prepared by the Bartow County Superior Court clerk.

inform the jury that the judge could not answer that question. (R. 57-58). Petitioner alleges that such a response was tantamount to giving a "no" answer to the juror's question. However, what Petitioner patently ignores is that the judge did not give a "no" answer.

If the judge's response was in effect to tell the jury that they could not sentence Petitioner to life imprisonment without possibility of parole, then a full instruction to the jury in the courtroom would have more dramatically underscored to the jury their inability to prohibit a person under life sentence from being paroled. In responding as he did in this low key undramatic fashion, the trial judge chose the most advantageous way, from Petitioner's perspective, to protect Petitioner's rights. The Georgia Supreme Court was correct in holding that the communication did not amount to a charge to the jury and that the judge's refusal to answer a question did not undermine the integrity of the jury's choice of sentence. Berryhill v. State, supra at 554.

The cases cited by Petitioner are not in point. Rogers v. United States, 422 U.S. 35 (1975) involved (1) a federal trial and the applicability of F. R. Crim. P. 43 and not the Federal Constitution, (2) the fact that the trial judge gave a "yes" answer to the jury's question

outside the presence of the defendant, and (3) the communication took place during the guilt or innocence phase and not during sentencing.

In Shields v. United States, 273 U.S. 583 (1927) and Rice v. United States, 356 F. 2d 709 (8th Cir. 1966), the juries each sent the judges a message that they were having trouble agreeing; and both judges responded that the jury would have to find the defendant guilty or not guilty. Fillippon v. AlbionVein Slate Co., 250 U.S. 76 (1919) involved the judge's sending written instructions to the jury regarding contributory negligence after the jury had retired to deliberate. In United States v. Gay, 522 F. 2d 429 (6th Cir. 1975), the court excused jurors already impaneled and sworn outside the presence of the defendant and his counsel and without any explanation for excusing the jurors.

The closest federal case on point to that of Petitioner's is United States v. Mesteth, 528 F. 2d 333 (8th Cir. 1976). In Mesteth, the jury sent the judge two written messages: (1) a request to have a witness' testimony re-read and (2) a question as to whether the accused was right or left handed. "Each request was made by the jury's sending from the jury room a note delivered by the marshal to the judge, and each was refused by the

judge's writing 'no' and his signature on the note and delivering it to the jury through the marshal." United States v. Mesteth at 334. That court held, "The trial court's only response was simply to refuse the requests. [Emphasis added]. Thus there was no reasonable possibility of prejudice, and the error, if any, was harmless." United States v. Mesteth at 335.

In United States v. Reynolds, 489 F. 2d 4 (6th Cir. 1973), cert. denied, 416 U.S. 988 (1974), the jury asked the bailiff to ask the judge the height of one of the defendants. The judge relayed a response back to the jury that the jury could have no other information. The Sixth Circuit held that despite the fact that the communication was made outside the presence of the accused, the error was harmless. United States v. Reynolds at 8.

Decisions in the D.C. Circuit,[5] and the Fourth Circuit[6] have held communications between the judge and the jury, outside the presence of the accused, to be harmless error.

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[5]United States v. Diggs, 522 F. 2d 1310, 1320 (D.C. Cir. 1975)(Judge communicated to the jury that he could not give further instructions, and if the jury could not reach a verdict, the case would have to be retried).

[6]United States v. Arriagada, 451 F. 2d 487 (4th Cir. 1971), cert. denied, 405 U.S. 1018 (1972)(Judge informed the jury that "aiding and abetting" was a part of the first count and that count 2 was the conspiracy count).

In Rogers v. United States, 422 U.S. 35, 40 (1975), this Court recognized that communications between judge and jury, outside the presence of the accused, can be harmless error; and the Georgia Supreme Court has correctly determined that the communication between the judge and jury in Petitioner's case, if erroneous, was harmless.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for review have been set forth by Petitioner.

Respectfully submitted,

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